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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1043

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA,

*Petitioner*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.**

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA,

*Petitioner*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.**

Safway Steel Scaffolds Company of Georgia ("Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 7, 1967 and entered as its decree on November 8, 1967, after denial of the Petitioner's Petition for Rehearing.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, p. 1a; R., Vol. III, 122) is reported at 383 F. 2d 273. The per curiam order denying Petitioner's Petition for Re-

hearing from such opinion (Appendix A, *infra*, p. 17a; R., Vol. III, 164) is unreported. The Decision and Order of the National Labor Relations Board (Appendix A, *infra*, p. 25a; R., Vol. I, 116) is reported at 153 NLRB No. 32.

## JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1967, that Court denied Petitioner's Petition for Rehearing by per curiam order entered on October 24, 1967, and on November 8, 1967 that Court issued its decree enforcing in part and denying in part the Decision and Order of the National Labor Relations Board (hereinafter referred to as "the Labor Board"). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. Could the Court of Appeals determine that Petitioner had a right to discovery in this case where the dispositive issue is credibility but then deny Petitioner discovery solely on an assumption based on no evidence, in the record or elsewhere, that use of discovery could not have yielded relevant information on this issue?

2. Do the Labor Management Relations Act, the Rules and Regulations of the National Labor Relations Board, the Administrative Procedure Act, and due process of law as guaranteed by the United States Constitution, require administrative agencies to utilize pre-hearing discovery?

3. Is the decision of the Court of Appeals contrary to this Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962) by concluding that unilateral action after an impasse

in bargaining can be made retroactively illegal by virtue of a union bargaining offer occuring after the unilateral action?

## STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are the Fifth Amendment to the United States Constitution, Sections 552, 554 and 556 of the Administrative Procedure Act, (80 Stat. 381, 5 U.S.C. §§ 552, 554, 556) and Sections 8(a)(1), (3), (4), (5) and 10(b) of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 151 *et. seq.*) (hereinafter "the Act") (Appendix B hereto). The regulations involved are Sections 102.30 and 102.35 of the Labor Board's Rules and Regulations and Statements of Procedure, Series 8, as amended. (29 C.F.R. Sec. 101.1 *et. seq.*) (Appendix C hereto).

## STATEMENT OF THE CASE

These proceedings originated in an unfair labor practice charge of Teamsters Local 290 ("the Union") (R., Vol. I, 25). The Labor Board issued a Complaint against Petitioner, alleging that Petitioner violated Sections 8(a)(1), (3) and (5) of the Act (R., Vol. I, 30, 65). Prior to the hearing on the Complaint Petitioner repeatedly sought and was just as repeatedly denied use of any pre-trial discovery procedures.[1] The Trial Examiner denied discovery

[1]The Trial Examiner also refused to exclude from consideration testimony of one of the General Counsel's witnesses after the General Counsel refused to produce for cross-examination written statements of pre-hearing interviews with that witness (R., Vol. II, 20). The Labor Board attempted to patch up this error by stating that it was ignoring the testimony (R., Vol. I, 116n. 1). The Court of Appeals, although finding the Trial Examiner's action unlawful, accepted the Board's explanation (R., Vol. III, 128).

because "There is no provision in the Act authorizing the use of discovery procedure (R., Vol. I, 60, 64). Petitioner made the following motions for prehearing discovery:

(i) Motion for Bill of Particulars (R., Vol. I, 39);

(ii) Motion for Leave to Take Depositions (R., Vol. I, 53);

(iii) Application for Leave to Take Depositions on Written Interrogatories (after denial of leave to take oral depositions) (R., Vol. I, 60-61);

(iv) At the hearing of this case before the Trial Examiner and before the taking of any testimony, Petitioner renewed each of these motions (R., Vol. II, 3).

The Labor Board affirmed the total denial of discovery (Appendix A, *infra*, p.p. 25a-26a; R., Vol. I, 117).

The Court of Appeals ruled that the Labor Board was wrong in denying discovery, that the Act does provide for pre-hearing discovery, that the Labor Board has properly implemented the statutory provision in its rules and that it improperly denied discovery here. Denial of pre-hearing discovery was error. Nevertheless, the Court of Appeals found this error to be non-prejudicial. (Appendix A, *infra*, p.p. 4a-7a; R., Vol. III, 128-129).

The Labor Board then, by Petition for Rehearing, advised the Court of Appeals that the Court had incorrectly assumed that the Board's rules provided for discovery. The

Labor Board instead insisted that the Act and its rules "*do not* provide for pre-trial discovery procedures." (emphasis in original) (R., Vol. III, 159). The Labor Board said that the depositions referred to in its rules were only to be used "to perpetuate testimony of witnesses who may be unavailable at the time of trial". *Ibid.*[2] Since the Board's rules on their face do not provide any such limitation, it might have been supposed that this *ex cathedra* interlineation of its rules would have disturbed the Court of Appeals. It did not.

The Trial Examiner found that Petitioner threatened and coerced its employees, bargained in bad faith, unlawfully reduced wages and unlawfully refused to reinstate certain employees (Appendix A, *infra*, p.p. 39a-40a; R., Vol.I, 92-93). Petitioner excepted to these findings (R., Vol. I, 101) and in addition sought to reopen the record to introduce additional evidence, supported by sworn affidavits, refuting key credibility determinations of the Trial Examiner (R., Vol. I, 109). The Labor Board refused to reopen the record (Appendix A, *infra*, p.p. 25a-26a; R., Vol. I, 116) and affirmed and adopted all essential determinations of the Trial Examiner (Appendix A, *infra*, p. 26a; R., Vol. I, 117).

All of the rulings of the Labor Board were based on resolutions of credibility. The findings of threats and coercion were made solely on the basis of credibility determinations. The refusal to bargain finding in turn was

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[2]The Court of Appeals noted in its decision that it had in a previous case found no abuse of discretion by the Board in denying discovery. (R., Vol. III, 127n.6) Apparently the Court was unaware that the Labor Board's denial of discovery was not the exercise of discretion but instead was an automatic matter.

based on the illegal motivation found to exist by reason of the threats and coercion, and was not based on any external facts. (Appendix A, *infra*, p.p. 25a-26a; R., Vol. I, 116-117). The determination that the reduction of wages was unlawful was likewise based solely on the motivation gleaned from the threats and coercion. The determination of unlawful refusal to rehire was based solely on the refusal to bargain findings. The Court of Appeals bowing, somewhat cautiously, to the Labor Board's expertise, approved these determinations. While Petitioner believes that these credibility resolutions contradicted both indisputable facts and common sense, Petitioner's only assertion here is that the Labor Board's action in making findings based solely on credibility was unlawful after denial of pre-hearing discovery.

The Court of Appeals had its doubts about the credibility resolutions of the Labor Board. However, it explained away "any uneasiness" that it might have on this question by finding something the Labor Board never found — that Petitioner's wage reduction, in and of itself, was a clear violation of Section 8(a)(5) of the Act (Appendix A, *infra*, p.p. 12a-13a; R., Vol. III, 134-135). The Court of Appeals refused to remand this issue to the Labor Board for determination. (See Petitioner's Petition for Rehearing, (R., Vol. III, 146) and denial thereof (Appendix A, *infra*, p. 17a; R., Vol. III, 164)).

## REASONS FOR GRANTING THE WRIT

This Court must decide whether due process of law requires administrative agencies to allow parties to utilize pre-trial discovery or whether administrative agencies, alone, may still require trial-in-the-dark. The question is significant not only because a conflict exists between

Courts of Appeals[3] but also because of the constantly increasing role administrative agencies play in our society.

As has been stated, the sole basis for the Labor Board's conclusion that Petitioner violated the Act was its factual determination that Petitioner had an underlying illegal motivation, based on its credibility resolutions. The Court of Appeals recognizing at least twice in its decision that the Board findings all devolved from credibility determinations (Appendix A, *infra*, p.p. 3a,11a-12a; R., Vol. III, 124, 133-134) in turn refused to question these findings because of the "substantial evidence" rule. (Appendix A, *infra*, p. 10a; R., Vol. III, 132).

Because the credibility findings were determinative here, the denial to Petitioner of discovery procedure was dispositive of the ultimate decision. Denial of discovery must be evaluated in that context.

The Court of Appeals suggested at one point that the Labor Board's findings might be supported by a factor other than credibility, specifically that Petitioner's reduction of wages at the time of the strike constituted a separate violation of 8(a)(5) in that no impasse in the bargaining negotations then existed. (Appendix A, *infra*, p.p. 12a-13a; R., Vol. III, 134-135). The Labor Board never made such a determination, but rather found that because of Petitioner's illegal motivation, no genuine impasse existed. The Labor Board specifically found:

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[3]Compare the Court of Appeals decision here and that of the Fourth Circuit in *NLRB v. Southern Materials Company*, 345 F. 2d 240 (4th Cir. 1965) on the one hand with *NLRB v. Vapor Blast Manufacturing Company*, 287 F. 2d 402, 408 (7th Cir. 1961).

> "Although the negotiators had reached an *apparent deadlock* at the time the . . . [Petitioner] cut wages, the . . . [*Petitioner*] *had not bargained in good faith* . . . and thus there was not *a genuine impasse* in the bargaining negotiations which would justify unilateral action." (R., Vol. I, 117 n. 3). (emphasis added).

Thus, even assuming that the Court of Appeals could have found no impasse to exist, this finding also was derived from the essential credibility determinations. (Appendix A, *infra*, p.p. 12a-13a; R., Vol. III, 135). In any case the Court of Appeals' decision in this regard is directly contrary to this Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962).

1. Denial of Petitioner's various attempts at discovery was prejudicial and the Court of Appeals erred in not remanding the case to the Labor Board. In its opinion, the Court of Appeals stated:

> "The question remains whether the error was prejudicial. It is clear that in ordinary civil cases tried in federal courts, an appeal based on an infraction of the rules will not succeed unless the infraction was substantial enough to prejudice the appellant's case. *Bell v. Swift & Co.*, 5th Cir., 1960, 283 F.2d 407; *Tiedman v. American Pigment Corp.*, 4th Cir., 1958, 253 F.2d 803; Fed. R. Civ. P. 61; *Wright, Federal Courts*, §81 at 312 (1963). Applying the same standard of review, we conclude that the denial of the motion for leave to take depositions was a technical error

which did not result in prejudice to . . . [Petitioner's] case."[4]

This Court has refused to distinguish between direct and indirect relevance where a party is denied discovery to which it is entitled. *Jencks v. United States*, 353 U.S. 657, 671 (1957). The Court of Appeals' attempt to examine the denial of discovery in terms of whether it was prejudicial[5] must fail for the same reason; in *Jencks* as here, such lines cannot be drawn by appellate courts because they require re-evaluation of all the facts. This is the exclusive function of the Labor Board.

The Court of Appeals attempted to avoid the dilemma of re-evaluating facts (and thereby entering into activity which it recognized was prohibited) or else remanding the case to the Labor Board, by finding the denial of discovery to be non-prejudicial. Its ground for this conclusion was that discovery was not necessary in that Petitioner could at trial have called available witnesses in order to create contradiction. This is ridiculous. It is nothing but an affirmation of the ancient "trial by chance", which the entire discovery process under the Federal Rules was designed to eliminate. *Hickman v. Taylor*, 329 U.S. 495 at 501 (1947). See also 4 Moore, Federal Practice, ¶26.02[1], pp. 1031-1036; Clark, Code Pleadings, 567-568 (2d ed. 1947).

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[4]None of the cited authorities dealt with denial of discovery. The Court of Appeals does not indicate how the citations are authority for denying discovery. As the Court in *Tiedman v. American Pigment Corporation, supra*, at 808 stated: "a trial is not a sporting event." Denial of discovery makes it one.

[5]The decision of the Court of Appeals postulated that the Petitioner in seeking discovery, "showed good cause for granting the motion and that a procedural error was committed" (Appendix A, *infra*, p. 6a, R., Vol. III, 128). Having found the existence of error, the Court of Appeals then determined the error to be non-prejudicial.

The Court of Appeals in effect said that denial of discovery was non-prejudicial because trial-in-the-dark was possible. Without pre-trial preparation no litigant is willing to take the risk of examination of hostile witnesses at a hearing to establish contradiction or to obtain information in order to build his case. Cf. *Pacific Molasses Company v. F.T.C.*, 356 F.2d 386, 390 (5th Cir. 1966). ("Effective cross-examination requires thorough preparation by counsel before trial.") Discovery procedures were created to eliminate this dilemma. The Court of Appeals found authority for discovery in Labor Board's hearings, approved the Labor Board's rules authorizing discovery on showing of good cause, postulated the good cause, then found no prejudice in denial of discovery. The underlying purpose of discovery is adequate refutation of the Court of Appeals' conclusion.

But, in addition, the Court of Appeals stated after reviewing certain evidence that:

> "Although [Petitioner's] rebuttal evidence might have led us to a different result had we been the original triers of fact, we cannot, under the substantial-evidence rule, say that the Board, following the Examiner, was unreasonable in believing the employees or that its findings were not based upon such relevant evidence as a reasonable mind might accept." (Appendix A, *infra*, p. 12a; R., Vol. III, 134).

Thus the Court of Appeals admitted that even without affording the benefit of discovery to the Petitioner, the Labor Board had been unable to present a convincing basis for its conclusions. Adequate discovery would cer-

tainly have permitted more adequate presentation of rebuttal evidence, particularly on the issue of Petitioner's economic motivations.

Petitioner would have been afforded a fair hearing had discovery been permitted.

2. There is no basis for the Labor Board's claim that the use of discovery procedures is not available (See Labor Board's Petition for Rehearing (R., Vol. III, 159) or that it should not be available.

The Court of Appeals correctly held that under Section 10(b) of the Act depositions were permitted:

> "Any such unfair labor practice proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for district courts of the United States, . . . ".

Rules 26-37 of the Federal Rules of Civil Procedure provide for discovery and Section 10(b) of the Act specifically provides for unfair labor practice proceedings to be conducted in accordance with those same Federal Rules of Civil Procedure. The statutory requirement is clear. Nonapplication of the Federal Rules is permitted only if application is not practicable. Rules 102.30 and 102.35 of the

Labor Board's own Rules and Regulations authorize the taking of depositions in unfair labor practice cases.[6]

There has been no allegation or showing by the Labor Board that in this case it was not practicable for the discovery provisions of the Federal Rules of Civic Procedure to be applied. The Board's refusal to allow Petitioner prehearing discovery was based upon its assumption that it cannot, will not, and should not permit discovery. For the Labor Board arbitrarily to decide that it will not allow discovery in its proceedings is not only violative of both the letter and the spirit of the Act; it is violative of elementary principles of fair play, the provisions of the Administrative Procedure Act which provide for discovery and require a fair hearing, and the due process guarantee of the Fifth Amendment to the Constitution.

In *NLRB v. Southern Materials Company*, 345 F.2d 240, 244 (1965), the Court of Appeals for the Fourth Circuit reached the same conclusion as to the availability of discovery under the Act as that reached by the Court of Appeals here. The Court of Appeals for the Seventh Cir-

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[6]Section 102.30 provides for the taking of testimony "by deposition". Section 102.35 affords Trial Examiners the authority "to take or cause depositions to be taken whenever the ends of justice would be served thereby." The Court of Appeals below has apparently believed that the Labor Board's rule provided for pretrial discovery. See *NLRB v. Movie Star, Inc.*, 361 F. 2d 346, 352 (1966), cited in the Court of Appeals' decision. (Appendix A, *infra*, p. 6a n.6; R., Vol. III, 127 n. 6) The Labor Board, however, now asserts that depositions are permissible only to perpetuate the testimony of unavailable witnesses. This restricted definition did not come to light until the Labor Board's Petition for Rehearing filed in this case (R., Vol. III, 159). Such a definition is not only contrary to Section 556(c)(4) of the Administrative Procedure Act but also ignores the Labor Board's Rules and Regulations and thereby violates administrative due process of law. *Pacific Molasses Company v. F. T. C.*, 356 F. 2d 386, 387-390 (5th Cir. 1966).

cuit has reached a contrary conclusion. *NLRB v. Vapor Blast Manufacturing Company*, 287 F.2d 402, 408 (7th Cir. 1961). This Court should resolve the conflict.

The Labor Board has always shown a total unwillingness to follow due administrative procedure. The Labor Board refused to apply even the *Jencks* rule until compelled to by the appellate courts. *NLRB v. Adhesive Products Corporation*, 258 F.2d 403 (2nd Cir. 1958). And even when it applied *Jencks*, it did it in an impermissibly limited manner. *Harvey Aluminum (Incorporated) v. NLRB*, 335 F.2d 749 (9th Cir. 1964).[7]

No justification exists for the Labor Board's position. It cannot claim that the need to protect employees outweighs rights to discovery in view of the extension of discovery to the area in which the informer privilege was first utilized. *Jencks v. United States*, *supra*. Present rules of criminal procedure allow a defendant to obtain the use of discovery procedures. If an employer seeks retribution against an employee for giving information, the Labor Board has adequate means of protecting the employee under Section 8(a)(4) of the Act. In addition, the names of employees included in an unfair labor practice charge are revealed at the hearing. In fact labor law practitioners believe that the use of discovery would decrease the Labor Board's "workload and would also decrease the period of time between the issuance of a complaint and the transfer of the case to the Board." *Report*

[7]The Labor Board has been equally unwilling to comply with the Administrative Procedure Act in formulation of substantial rules. See Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L. J. 719 (1961); *Boire v. The Miami Herald Publishing Co.*, 343 F. 2d 17 (5th Cir. 1965).

*of the Committee on Practice and Procedure under the National Labor Relations Act, Section of Labor Law*, A.B.A. Rep. 232 (1966). The question is not protection of *employees* but protection of the advantage the Labor Board gains from trial-in-the-dark. There is no reason why a defendant in a Labor Board hearing should be entitled to fewer procedural rights than a defendant before other administrative agencies[8] or a defendant in a court of law. As Mr. Lee Loevinger, Federal Communications Commissioner and former Assistant Attorney General of the United States recently stated:

> "... I suggest that the most important initial reason for the Government agencies desire not to have discovery is the simple desire to retain an advantage in litigation. If you have the subpoena power and you have the right to investigate and the right to look at all your opponent's files, if you have the right to interrogate his officials and he has no comparable rights with respect to your clients or your interests, would you willingly give them up if you had any choice? Of course not. No sensible lawyer would".[9]

That such a position is understandable does not make it correct.[10]

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[8]Among those administrative agencies which allow discovery are the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Power Commission, the Federal Communications Commission and the Federal Trade Commission. *Pre-Trial Discovery and Preparation for Trial* 20 Ad. L. Rev. 55, 59ff (1967).

[9]*Id.* at 80.

[10]Congress has also recently recognized the administrative agencies' penchant for secrecy and has had to, by statute, require administrative agencies to afford the public access to information in their possession. See Administrative Procedure Act, 81 Stat. 54, 5 U.S.C. §552 (Appendix B, *infra*, p. 49a-50a).

3. The Court of Appeals suggested that no impasse existed at the time Petitioner instituted a wage reduction and therefore the finding of refusal to bargain could rest on a determination not involving credibility. The Labor Board had made no such determination and therefore the Court of Appeals' refusal to remand the question to the Labor Board — the primary trier of fact — was in error. But assuming, *arguendo*, that the Court of Appeal had authority to make this determination, the determination is flatly contrary to this Court's determination in *NLRB v. Katz*, 369 U.S. 736 (1962). *Katz* held that a unilateral change in wages may lawfully be made subsequent to an impasse. The Court of Appeals' contrary determination cannot stand and cannot be used to circumvent the effects of denial of discovery here.

No one — not the witnesses, the Labor Board, nor the Court of Appeals — held that an impasse in bargaining had not occurred. The only testimony on this subject was that of Union Negotiator Alden. Alden stated:

> "Mr. Dean [the Federal Mediator] did all in his power, I believe, with both sides to see if some agreement could be reached. However, it did not appear possible . . . apparently, the position was hopeless as far as the Company was concerned; the Union representatives feeling the same."****
>
> I felt the negotiating could not be fruitful unless the Company would consider the negotiations at least at the current rate of pay and the benefits the employees were receiving at that time." (R., Vol. II, 30-31).

The Labor Board, acknowledging the existence of a bargaining impasse, found that the impasse was not "genuine" because of Petitioner's bad motivation — based on its credibility resolutions. The Court of Appeals suggested that the impasse somehow dissolved. The Court of Appeals stated:

> "... in fact, [the Union] was constantly revising proposals until finally it announced in August that it was prepared to accept the exact terms of the expired contract." (R., Vol. III, 135).

But the wage reduction was made immediately after impasse and well prior to the first meeting between the parties after impasse. In fact, there were no meetings for 37 days after the impasse. The Court of Appeals' decision prevents any action after impasse. Under that decision if one side gives in after a strike occurs, the existence of an impasse at the time of strike is *retroactively* destroyed. The decision of the Court of Appeals means a union could always preclude an employer from instituting a unilateral change subsequent to an impasse by waiting for a unilateral change to be effected and then stating that it is willing to negotiate on the issue. This Court's ruling in *Katz* prohibits such a decision and requires reversal of the decision of the Court of Appeals.

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January, 1968

## APPENDIX A

**In The**

**UNITED STATES COURT OF APPEALS**

**For The Fifth Circuit**

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**No. 23548**

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

*versus*

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA,
*Respondent.*

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**Petition for Enforcement of an Order of the National Labor Relations Board. (Florida Case).**

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(September 7, 1967.)

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Before PHILLIPS,* THORNBERRY and DYER, Circuit Judges.

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* Of the Tenth Circuit, sitting by designation.

THORNBERRY, Circuit Judge: The National Labor Relations Board seeks enforcement of an order based upon a finding that respondent, Safway Steel Scaffolds Company of Georgia, violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (a)(3), (a)(5). In March, 1964, two months

before expiration of the collective-bargaining agreement, the union advised the company that it desired to negotiate.[1] The company replied that meetings would have to be delayed but offered to "save negotiation time and expense" by extending the existing contract for one year. Representatives of the union rejected this offer, saying they wanted to negotiate five items, including a wage increase of twenty cents "across the board." Meetings were held between May 4 and August 13, 1964. At the meetings, representatives of management insisted on wage reductions up to twenty-nine cents per hour for warehousemen and fifteen cents for drivers (which meant an hourly wage of $1.45 for warehousemen and $1.75 for drivers). On June 30 the union notified the company that the employees would strike on the following day, and on July 1 six of the company's eight employees did, in fact, go on strike. After receiving notification of strike on June 30, the company announced it would put in effect the wage reduction previously threatened;[2] and on July 1 warehousemen were reduced by twenty-nine cents and drivers by fifteen cents. Also on July 1, the company advised each striker by letter that he would be discharged if he did not return by July 6. The six strikers plus a seventh employee who had been hospitalized at the commencement of the strike chose to accept discharge.

In August, 1964, a mediator made two attempts to reconcile the parties. At the second meeting of August 13, the union agreed to accept the exact terms of the old con-

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[1] Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[2] General Counsel's Exhibit No. 12 is a letter written on June 15 from Safway to David Frechette. It suggests that the company had already selected July 1 as the date on which to reduce wages. This was before the union had responded to changes in the contract proposed by the company on May 28.

tract; but the company insisted on wage reductions and other changes unfavorable to the union. On September 18 the union notified the company by telegram that the strikers would return to work unconditionally and on September 21 all seven reported to the plant; but the manager, Mr. John Wallace, turned them away.[3] Eventually, five of the seven were hired at the reduced rates.

Unfair-labor-practice charges had been filed with the Board on August 14. After a hearing in February, 1965, the trial examiner concluded that the company, by its entire course of conduct, had attempted to undermine the union and had refused to bargain in good faith, thus violating sections 8(a)(1) and 8(a)(5) of the Act. He further held that the refusal to bargain in good faith caused the strike and that the employees were therefore unfair-labor-practice strikers entitled to reinstatement upon unconditional application. The refusal to reinstate constituted discrimination in violation of section 8(a)(3). The examiner recommended that the company be ordered to cease and desist from the unfair practices found and that it be enjoined from infringing in any manner upon the rights to organize and engage in concerted activities as guaranteed by section 7. Affirmatively, he recommended that the company be required to bargain with the union upon request, to revoke the unilateral wage scale adopted on July 1, to offer reinstatement to two employees, to make whole all employees for economic losses suffered by reason of the discrimination found or by reason of the unilateral wage reductions, and to post appropriate notices of its obligations under the order. The Board adopted the trial exam-

[3] After turning away the seven strikers, the manager apparently had a second thought; for he offered reinstatement to two drivers at the reduced rate as the group was leaving the plant. None returned on that date.

iner's recommendations in full. After careful review of the record, we conclude that there is substantial evidence to support enforcement of the Board's order except to the extent that it would enjoin the company from violating section 7 "in any other manner." This part of the order is overboard and will not be enforced.

## I. Alleged Procedural Errors

Before considering the unfair labor practices in dispute, we will dispose of respondent's contention that procedural errors committed by the trial examiner require reversal. First, it is asserted that the examiner erred in denying a motion for leave to take depositions.[4] In a nutshell, respondent argues that it needed to take depositions in order to probe the oral accounts forming the basis for the Board's charges, that the examiner was wrong in ruling that the Act does not provide for discovery, and that this error prejudiced its substantial rights and constituted a denial of due process. In his ruling, the examiner relied principally upon *NLRB v. Globe Wireless*, 9th Cir. 1951, 193 F.2d 748, 751, wherein the court held that the refusal to allow the taking of depositions was not a denial of due process since the Act does not provide for pretrial discovery.

Section 10(b) of the Act would appear to give a trial examiner authority to permit the taking of depositions in any case where such a procedure would be practical:

> Any such unfair labor practice proceeding shall, so far as practicable, be conducted in accordance

[4] Respondent made two motions — one to take oral depositions and the other to take depositions on written interrogatories. Both were denied for the same reason.

> with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, . . .[5]

However, the practicality of having pretrial discovery in labor proceedings has been somewhat uncertain. In 1960, Member Jenkins submitted a committee's proposals for changes in the Board's rules and regulations. 45 L.R.R.M. 94, 101 (1960). Among other things, he noted that it would be desirable to have pretrial discovery but that it would not be feasible for trial examiners to preside over the taking of all depositions. He went on to say that there was no reason why the inability of examiners to preside should be an insuperable obstacle:

> Personally, I can see no reason why such depositions could not be taken by either party as a matter of right before anyone authorized by the State or Federal government to take oaths, if some means could be devised for enforcing this right without having to resort to the tedious and time-consuming process of obtaining a court order to enforce the right of deposition.

The Board was persuaded by this comment and evidently did not visualize any real problem of enforcement; for its rules and regulations now provide a detailed procedure for the taking of depositions if in the judgment of the trial examiner good cause has been shown. NLRB: Statements of Procedure, Rules and Regulations §§ 102.30, 102.35 (*Lab. Rel. Rep.* LRX 4058, 4060). In light of section 10(b)

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[5] Fed. R. Civ. P. 26-37 govern pretrial discovery in civil cases to be tried in federal district courts. Rules 26-32 set out detailed procedures for taking depositions upon oral examination and written interrogatories.

and of these new rules, which were in effect when the hearing in the instant case was conducted, we must conclude that the examiner was wrong in holding that there is absolutely no provision for pretrial discovery.

It is within the trial examiner's discretion to grant or deny a motion for leave to take depositions, but here the examiner did not believe he had any discretionary authority to exercise.[6] We will assume, therefore, that respondent showed good cause for granting the motion and that a procedural error was committed. The question remains whether the error was prejudicial. It is clear that in ordinary civil cases tried in federal courts, an appeal based on an infraction of the rules will not succeed unless the infraction was substantial enough to prejudice the appellant's case. *Bell v. Swift & Co.*, 5th Cir. 1960, 283 F.2d 407; *Tiedman v. American Pigment Corp.*, 4th Cir. 1958, 253 F.2d 803; Fed. R. Civ. P. 61; *Wright, Federal Courts*, § 81, at 312 (1963). Applying this same standard of review, we conclude that the denial of the motion for leave to take depositions was a technical error which did not result in prejudice to respondent's case.

The Board's finding of unfair labor practices was predicated in part on alleged statements by respondent's manager, Mr. John Wallace, which tended to undermine the union and in part on a unilateral reduction in wages before a bargaining impasse had been reached. The unilateral reduction in wages was determined by looking to

[6] *NLRB v. Movie Star, Inc.*, 5th Cir. 1966, 361 F.2d 346, 352 and *Trojan Freight Lines, Inc. v. NLRB*, 6th Cir. 1966, 356 F.2d 947 both involved the procedural question now before us. In each case, the court held that there was no abuse of discretion in denying the motions for pretrial discovery. In *NLRB v. Southern Materials Co.*, 4th Cir. 1965, 245 F.2d 240, 244, on the other hand, the Fourth Circuit said in dictum that the Board should generally allow pretrial discovery inasmuch as it acts in a quasi-judicial capacity.

the chronology of events about which there is no dispute. Respondent could not have shed a different light on this matter by engaging in pretrial discovery. The alleged statements by Wallace were reported by the strikers, especially by Frank Edward Cogdel. These men were all available to testify as witnesses, and the company had ample opportunity to discredit their accounts by cross-examining those who testified for the General Counsel or by presenting rebuttal testimony.[7] Further, the company was given an opportunity to examine a statement made before the hearing by Frank Edward Cogdel to an attorney for the Board. In all, it appears that respondent had a full and fair hearing and that its rights were not prejudiced by the procedural defect. In *Bell v. Swift & Co.*, 5th Cir. 1960, 283 F.2d 407, 409, this Court made it clear that where a trial is conducted properly and all evidence is heard, the failure of the trial judge to allow discovery will not amount to prejudicial error.

Respondent complains of a second procedural error necessitating reversal. Witness David Frechette, a union official, testified as to matters discussed during the various meetings. On cross-examination, counsel for the company elicited from him the fact that he had an interview with an attorney for the Board prior to the hearing and that the attorney took notes during the interview. The trial examiner said that the General Counsel could not be required to produce these notes for respondent's inspection because

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[7] Respondent complains that the trial examiner arbitrarily limited testimony so that it was unable to present witnesses whose testimony might have been vital. However, it is clear that the examiner was simply instructing the General Counsel to avoid cumulative testimony. He expressly stated that he did not intend to limit rebuttal evidence. R., 66-68.

they were not signed or otherwise approved by the witness.[8] This ruling is assigned as error.

The Jencks Act, 18 U.S.C. § 3500, permits the production of statements by a government witness who has testified on direct examination in a criminal trial. Statements are producible if they meet the requirements of either the first or second clause of subsection (e) of the statute. Under the first clause, a written account of an interview between government agent and government witness is producible if it has been signed "or otherwise adopted or approved" by the witness. Under the second clause, the written account is producible if it is a "contemporaneous" and "substantially verbatim" recording or transcription of the interview. The reproduction contemplated by the second clause can be manual as well as mechanical. *Palermo v. United States*, 1959, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287; *United States v. Waldman*, D. N.J. 1958, 159 F.Supp. 747. The phrase "substantially verbatim" does not mean "precisely verbatim" though the writing must not contain the comments, impressions, or opinions of the agent. *Williams v. United States*, D.C. Cir. 1964, 338 F.2d 286; *United States v. McKeever*, 2d Cir. 1959, 271 F.2d 669.

In *Ra-Rich Manufacturing Corp.*, 1958, 121 N.L.R.B. 700, the Board accepted the rules for production of statements as established by the Jencks Act and the case of *Jencks v. United States*, 1957, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103.[9] Thereafter, the Board amended its rules

[8] The examiner denied respondent's motion after learning from the witness that he had not signed or otherwise approved the notes. The examiner did not look at them.

[9] The Second Circuit held that the rule of the *Jencks* case applies to Board proceedings in *NLRB v. Adhesive Prods. Corp.*, 2d Cir. 1958, 258 F.2d 403. This holding was expressly accepted by the Board in *Ra-Rich*.

and regulations to cover its decision in the *Ra-Rich* case; but in so doing it limited the right of production to written statements signed or otherwise approved by the witness. NLRB: Statements of Procedure, Rules and Regulations § 102.118 (*Lab. Rel. Rep.* LRX 4079). While this limitation doubtless explains why the trial examiner would not require production of the notes taken during Frechette's interview, we must agree with the Ninth Circuit's conclusion that the Boards' rules would be arbitrary and invalid to the extent that they did not also require the production of substantially verbatim transcriptions of oral statements not signed or otherwise approved by the witness. *Harvey Aluminum, Inc. v. NLRB*, 9th Cir. 1964, 335 F.2d 749, 753, 756.

In *Saunders v. United States*, D.C. Cir. 1963, 316 F.2d 346, a government attorney had taken notes during his interview with a government witness. The appellate court held that the trial judge erred in failing to examine the notes to determine whether they were a substantially verbatim recital of what the witness had said. We believe that the trial examiner in the instant case erred for the same reason. Again, however, we conclude that the procedural defect did not prejudice respondent's case. David Frechette simply gave his version of the negotiations; his testimony did not form the basis for any of the Board's findings. If his testimony were disregarded entirely, we would still find substantial evidence in the record to justify enforcement of the order issued by the Board.[10]

[10] We find respondent's complaint of a third procedural error to be without merit. Though counsel for the company had studied Frank Edward Cogdel's pretrial statement before cross-examining him, he asked to see the statement again before cross-examining John Wesley Cogdel. This motion was denied. Regardless of whether the Jencks Act requires production under these circumstances, it is inconceivable that respondent's case was prejudiced by denial of the motion since its attorney had already familiarized himself with the contents of the statement.

## II. Violations of Sections 8(a)(1), (a)(3), and (a)(5)

As in all cases involving judicial review of administrative decisions, we begin with the often-repeated principle that the Board's order must be sustained if supported by substantial evidence in the record considered as a whole. *NLRB v. Brown*, 1965, 380 U. S. 278, 85 S.Ct. 980, 983, 13 L.Ed.2d 839, 849; *Universal Camera Corp. v. NLRB*, 1951, 340 U. S. 474, 71 S.Ct. 456, 95 L.Ed. 456. Accordingly, if the Board's determination is based upon such relevant evidence as a reasonable mind might accept as adequate to support it, we are not at liberty to deny enforcement simply because the evidence may also reasonably support other conclusions or because we might justifiably have reached a different conclusion had the matter come before us de novo. *NLRB v. Camco, Inc.*, 5th Cir. 1966, 369 F.2d 125, 127. With this standard in mind, we turn to the unfair labor practices found by the Board.

Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 gives employees the right to organize, to bargain collectively, to engage in concerted activities for the purpose of collective bargaining and also the right to refrain from engaging in any or all of these activities. Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain in good faith with properly selected representatives of the employees. The Board based its finding that these two sections were violated on the company's whole course of conduct between May and August, 1964 but particularly on statements allegedly made by Mr. John Wallace to the employees. Two employees—Frank Edward Cogdel, the shop steward, and

John Wesley Cogdel—testified that on May 15, 1964 Mr. Wallace read the entire collective-bargaining agreement to all of the employees and then proceeded to tell them that he was determined to "get rid of the union." Frank Edward Cogdel further testified that on two occasions in June Mr. Wallace told him that there was no need for a union and that the employees need not be concerned about a cut in pay if they would abandon it. Quincy Knox (the hospitalized employee who joined the strikers late) said that on July 6 Wallace told him that he could return to work for $1.45 per hour but that he would not feel the impact of this cut if he would simply withdraw from the union and quit paying dues. On the basis of these statements and of the persistence with which the company's negotiators demanded a reduction in wages, the trial examiner concluded that the company had not bargained in good faith and had restrained the employees in the exercise of rights guaranteed under section 7. The examiner felt that the demands for reduced wages and other unfavorable changes were motivated by anti-union sentiment since the company had offered to extend the terms of the old agreement before negotiations ever began.[11]

Of course, respondent presented some rather persuasive rebuttal evidence. First, it offered witnesses whose testimony tended to support the position that it demanded a reduction in wages because it was pricing

[11] Certain changes demanded by the company indicate that it was determined to be rid of the union or at least to weaken it and was not making a bona fide effort to reach agreement. For example, the company proposed to eliminate the union security provided by a dues check-off, to eliminate the requirement that the union be notified of an employee's discharge, and to insert a requirement that a union official receive permission before visiting an employee on company premises. These changes were obviously unrelated to the company's avowed purpose of achieving greater economy of operations.

itself out of the market by paying higher wages than competitors. Second, it offered evidence which tended to show that Mr. Wallace could not have made the statements he allegedly made to Frank Edward Cogdel on two separate occasions in June because he was not at the plant on either of those days. The making of the statements to all employees in May and to Quincy Knox in July was denied but not effectively refuted. Although this rebuttal evidence might have led us to a different result had we been the original triers of fact, we cannot, under the substantial-evidence rule, say that the Board, following the examiner, was unreasonable in believing the employees or that its findings were not based upon such relevant evidence as a reasonable mind might accept.

Any uneasiness we might have about the credibility of Frank Edward Cogdel, the General Counsel's principal witness, is overcome by the fact that respondent clearly violated section 8(a)(5) when it reduced wages on July 1. As early as June 15, the company hinted that it planned to reduce wages on July 1; and when advised on June 30 that a strike would start the following day, it announced that the plan would be put into effect. The law is clear that unilateral changes in terms under negotiation constitute bargaining in bad faith if made before there is an impasse. *NLRB v. Katz*, 1962, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed.2d 230. In the instant case, a bargaining impasse had not been reached when the unilateral change was made. The union appears to have been willing to negotiate at all times—in fact, it was constantly revising proposals until finally it announced in August that it was prepared to accept the exact terms of the expired contract. The company, while less com-

promising, did revise its wage proposal upward just before putting into effect the reduction of fifteen cents for drivers and twenty-nine cents for warehousemen.[12] Further, the conduct of Mr. Wallace indicates that the company was not making a bona fide effort to reach agreement. Where good faith on the part of management is lacking, the courts will not recognize the existence of a bargaining impasse. *NLRB v. Herman Sausage Co.*, 5th Cir. 1960, 275 F.2d 229, 234; *NLRB v. Andrew Jergens Co.*, 9th Cir. 1949, 175 F.2d 130, 136, cert. denied, 338 U.S. 827, 70 S.Ct. 76, 94 L.Ed. 503. The only factor which might seem to reflect the existence of an impasse would be the strike, but the use of economic pressure by a union does not relieve the company of the duty to bargain. As Judge Brown stated in *NLRB v. Rutter-Rex Mfg. Co.*, 5th Cir. 1957, 245 F.2d 594, 596, "A strike does not in and of itself suspend the bargaining obligation."

Section 8(a)(3) prohibits discrimination by an employer "in regard to hire or tenure of employment or any term or condition of employment." The Board's determination that this section was violated by the company's refusal to reinstate the strikers upon unconditional application rests upon the finding that the men were engaged in an unfair-labor practice strike as opposed to an economic strike. A strike is characterized in this way so as to give employees the right to be reinstated if an unfair labor practice had anything to do with causing it. *Mastro Plastics Corp. v. NLRB*, 1956, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309; *NLRB v. American Aggregate Co.*, 5th Cir. 1962, 305 F.2d 559. As we have agreed that respondent violated sections 8(a)(1) and (a)(5), the conclusion

[12] On June 29 the company revised the proposed wage reduction to twenty-four cents for warehousemen and ten cents for drivers.

that the strike was caused in part by unfair labor practices is unavoidable. Even if there were no unfair labor practice other than the unilateral reduction in wages, the strike would still have been the kind which entitled the employees to reinstatement. It is true that the reduction in wages occurred on the same day the strike began so that it would not have been the initial cause of the strike, but this unilateral change would nevertheless have contributed to the continuation of the strike. Where an unfair labor practice intervenes to prolong a strike, the employer is bound to reinstate all strikers. *General Drivers & Helpers Union, Local 622 v. NLRB*, D.C. Cir. 1962, 302 F.2d 908; *NLRB v. Crosby Chemicals, Inc.*, 5th Cir. 1951, 188 F.2d 91; *NLRB v. Remington Rand, Inc.*, 2d Cir. 1942, 130 F.2d 919, 929.

## III. Enforcement of the Board's Order

As previously noted, the Board ordered the company to cease and desist from its unfair labor practices and enjoined it from infringing in any manner upon the rights to organize and engage in concerted activities as guaranteed by section 7 of the Act. Affirmatively, it ordered the company to bargain upon request, to revoke the unilateral wage scale adopted on July 1, 1964 and revert to the wage scales and benefits in force prior to that date, to offer reinstatement to Frank Edward and John Wesley Cogdel, to make whole all employees for economic losses suffered by reason of the discrimination found or by reason of the unilateral wage reductions, and to post an appropriate notice of its obligations under the order. Since we have affirmed the finding that respondent transgressed sections 8(a)(1), (a)(3), (a)(5), we accordingly

grant enforcement of the entire order with the exception of that part which enjoins the company from violating section 7 "in any other manner." This broad provision is denied.

In *NLRB v. Southwire Co.*, 5th Cir. 1965, 352 F.2d 346, 349, and more recently in *Southwire Co. v. NLRB* 5th Cir. 1967, No. 23800, August 2, 1967, this Court considered sweeping injunctions against any violation of section 7. In the earlier case, the Board's order was limited to the specific violations found:

> While this Court has approved orders prohibiting conduct beyond the specific acts found by the Board to amount to unfair labor practices, when we found it appropriate to affirm the Board's finding that the respondent had "demonstrated a proclivity to violate the act," Truck Drivers & Helpers Local Union No. 728 v. NLRB, 5th Cir., 332 F.2d 693, 697, our attention has not been called to any case in which we have approved an order as broad as that here urged upon us by the Board. This order would amount to an injunction against any violation of section 7. We think the record before the Trial Examiner does not warrant an order of such breadth.

In the more recent *Southwire* case, the Court decided that the company had demonstrated a proclivity to violate certain sections of the Act but that the injunction against any violation of section 7 was still too broad. Reliance was placed upon *NLRB v. Express Publishing Co.*, 1941,

312 U.S. 426, 433, 61 S.Ct. 693, 698, 85 L.Ed. 930, . . . ., wherein the Supreme Court warned against an order so broad as to contemplate enforcement by the courts in contempt proceedings where violations would be involved which were unrelated to the ones found by the Board:

> It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

In the instant case, there was no showing of a proclivity to violate the Act or certain sections of the Act. To avoid the undesirable consequence envisioned by the Court in the *Express Publishing* case, we therefore deny enforcement of the broad provision against any violation of section 7.

ENFORCED in part; DENIED in part.

IN THE

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

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No. 23548

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA,
Respondent.

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**Petition for Enforcement of an Order of the National Labor Relations Board (Florida Case).**

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( October 24, 1967.)

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**ON PETITIONS FOR REHEARING**

Before PHILLIPS,* THORNBERRY and DYER, Circuit Judges.

PER CURIAM: It is ORDERED that the petitions for rehearing filed by Petitioner and Respondent in the above styled and numbered cause be, and the same are hereby DENIED. However, the following language is added as Footnote [13] on page 16 of the slip opinion, im-

* Of the Tenth Circuit, sitting by designation.

mediately preceding the last sentence of the first full paragraph of section III *(Enforcement of the Board's Order)*:

> [13]Although Respondent does not argue in its brief that this provision is overboard, it does make a proper exception to the provisions. Exception §32 filed by the Company to the Examiner's findings and recommended order reads as follows: "The Trial Examiner erred in finding that in any way Respondent interfered with, restrained or coerced employees in the exercise of their rights guaranteed by Section 7 of the Act, in violation of § 8(a)(1) of the Act, *or in recommending that Respondent be restrained from violating such Sections in the future.*" (Emphasis added)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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**No. 23548**

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA,
Respondent.

**DECREE**

Before: Phillips,* Thornberry and Dyer, Circuit Judges.

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* Of the Tenth Circuit, sitting by designation.

BY THE COURT:

THIS CAUSE was submitted to this Court upon a petition of the National Labor Relations Board to enforce its order dated June 24, 1965, against the above-named Respondent, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on March 16, 1967, and has considered the briefs and transcript of record filed in this cause. On September 7, 1967, the Court, being fully advised in the premises handed down its opinion enforcing in part and denying in part the Board's said order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court that Respondent, Safway Steel Scaffolds Company of Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in and activities on behalf of Aircraft and Engine Maintenance and Overhaul, Building and Construction Manufacturing, Processing and Distribution and Allied Industries Employees, Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily discharging or refusing to reinstate any of its employees, or by discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Discharging employees for exercising the right guaranteed by Section 7 of the Act to engage in concerted activities for their mutual aid or protection.

(c) Refusing to bargain collectively in good faith with the above-named labor organization as the exclusive representative of its employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(d) Making unilateral changes in wages, rates of pay, or other terms and conditions of employment of employees in the said unit, in a manner violative of the Act.

(e) Threatening employees with economic reprisals or making promises of benefit to discourage membership in and activity on behalf of the above-named labor organization.

(f) In any manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all employees in the appropriate unit in respect to rates of pay, wages, hours of employment, or other terms and conditions of employment and embody any understanding reached in a signed agreement.

(b) Revoke the unilateral wage change instituted on July 1, 1964, and revert to the wage scale and benefits existing immediately prior to said date.

(c) Offer to P. E. Cogdell and John Cogdell im-

mediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(d) Make them and employees Knox, Johnson, Anderson, Rosier and James, and all employees in the appropriate unit on the payroll as of July 1, 1964, or newly hired thereafter, for any loss of pay they may have suffered by reason of the discrimination found herein or of the unilateral change in wage rates, as set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(e) Notify P. E. Cogdell and John Cogdell, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to determine the amounts of backpay due.

(g) Post at its operations in Miami, Florida, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, Tampa, Florida, shall, after being duly signed by the Respondent's authorized representative, be posted by it immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily

posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any material.

(h) Notify the said Regional Director in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply herewith.

ENTERED: November 8, 1967

(ORIGINAL FILED — NOVEMBER 8, 1967)

## APPENDIX

## NOTICE TO ALL EMPLOYEES

## PURSUANT TO

A Decree of the United States Court of Appeals Enforcing in part and denying in part an order of the National Labor Relations Board, and in order to conduct our labor relations in compliance with the National Labor Relations Act, we notify you that:

> WE WILL NOT unlawfully discourage you from being members of AIRCRAFT AND ENGINE MAINTENANCE AND OVERHAUL, BUILDING AND CONSTRUCTION MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other union.

WE WILL NOT threaten you with reprisals, or promise any benefits, to discourage you from joining any union.

WE WILL NOT violate any of the rights you have under the NATIONAL LABOR RELATIONS ACT, to join a union of your own choice or not to engage in any union activities.

WE WILL offer reinstatement to P. E. Cogdell and John Cogdell.

WE WILL revoke the wage cut which became effective July 1, 1964.

WE WILL make whole P. E. Cogdell, John Cogdell, Quincy Knox, John Johnson, Jimmy Anderson, Eunice Rozier, A. B. James, and all employees in the appropriate unit who were on the payroll as of July 1, 1964, or were newly hired thereafter, for any loss of pay they may have suffered by reason of our discrimination against them or by reason of the unilateral change in wage rates.

WE WILL, upon request, bargain collectively with the union named above and, if an understanding is reached, sign an agreement covering such understanding. The unit represented by this union includes all our truckdrivers, helpers and warehousemen, but excludes office clerical em-

ployees, professional employees, guards and supervisors.

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA

(Employer)

Dated _____ By _____
(Representative) (Title)

NOTE: We will notify P. E. Cogdell and John Cogdell, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any material.

Employees may communicate directly with the Board's Regional Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida, 33602 (Tel. No. 228-7711), if they have any question concerning this notice or compliance with its provisions.

153 NLRB No. 32

D-8119
Miami, Florida

## DECISION AND ORDER

(Number and Title Omitted)

On April 5, 1965, Trial Examiner C. W. Whittemore issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed exceptions limited to the content of the Notice attached to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the ruling of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.[1] The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,

[1] At the hearing, the Trial Examiner rejected a request of the Respondent for production of a memorandum prepared by the General Counsel when he interviewed one of his witnesses, Frechette. As the memorandum was not read, signed, or otherwise approved or adopted by Frechette, we find no error in this ruling. In any event, even if Frechette's testimony be stricken, as the Respondent urges, the ultimate result we reach would remain unchanged inasmuch as our essential findings need not rest on Frechette's testimony.

the exceptions and briefs,[2] and the entire record in the case, and hereby adopts the findings[3] conclusions, and recommendations of the Trial Examiner.[4]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner as modified herein, and orders that the Respondent, Safway Steel Scaffolds Company of Georgia, Miami, Florida, its officers, agents, successors, and

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[2] After issuance of the Trial Examiner's Decision, the Respondent, in connection with certain alleged unlawful statements attributed to Manager Wallace, filed with the Board a motion to reopen the record to adduce additional evidence as to his absence from the plant on a certain date. The General Counsel filed an "Opposition To Motion To Reopen Record." Under the circumstances here, the proffered evidence is immaterial, cumulative and would not, in any event, alter our findings. Moreover, no adequate reason has been shown why the proffered evidence could not have been introduced at the hearing. For each of these reasons, we hereby deny the motion to reopen the record. The Respondent's request for oral argument is also hereby denied, as in our opinion, the record, including the exceptions and briefs, adequately presents the issues and positions of the parties.

[3] Unlike the Trial Examiner, we find it unnecessary to consider what motivated Manager Wallace in assembling the Respondent's employees at a meeting on May 15, 1964, and accordingly we do not adopt his findings in that regard. Without regard to whether Wallace had a legitimate reason for calling the meeting of employees on that occasion, we are not persuaded that the Trial Examiner erred in not believing Wallace's denial of credible testimony that he made unlawful statements in the course of reading the existing collective-bargaining contract to the employees at the meeting.

The Respondent seeks to justify a unilateral wage cut on the ground that it was made after consultation with the Union as to the change and after an impasse had been reached in bargaining negotiations. The Trial Examiner found that no impasse had been reached. Although the negotiations had reached an apparent deadlock at the time the Respondent cut wages, the Respondent had not bargained in good faith, as the Trial Examiner found, and thus there was not a genuine impasse in the bargaining negotiations which would justify unilateral action. See *Herman Sausage Co.*, 122 NLRB 168, 171-172, enfd. 275 F. 2d 229 (C.A. 5).

[4] As requested by the General Counsel, we will amend the notice attached to the Trial Examiner's Decision to conform to his Recommended Order, as more fully hereinafter indicated.

assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

Omit the sixth indented paragraph in the Notice attached to the Trial Examiner's Decision and, in lieu thereof, insert the following paragraph:
WE WILL make whole P. E. Cogdell, John Cogdell, Quincy Knox, John Johnson, Jimmy Anderson, Eunice Rozier, A. B. James, and all employees in the appropriate unit who were on the payroll as of July 1, 1964, or were newly hired thereafter, for any loss of pay they may have suffered by reason of our discrimination against them or by reason of the unilateral change in wage rates.

Dated, Washington, D. C. June 24, 1965.

Frank W. McCulloch,
Chairman

Gerald A. Brown,
Member

Sam Zagoria,
Member
NATIONAL LABOR
RELATIONS BOARD

TXD-176-65
Miami, Fla.

## TRIAL EXAMINER'S DECISION

### Statement of the Case

Upon original and amended charges filed by the above-named labor organization on August 14, September 2, 24 and 29, 1964, the General Counsel of the National Labor Relations Board on October 14, 1964, issued his complaint and notice of hearing. On January 12, 1965, the complaint was amended. Answers were duly filed by the Respondent. The complaint, as amended, alleges and the answers deny that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended. Pursuant to notice, a hearing was held in Miami, Florida, on February 2 and 3, 1965, before the undersigned Trial Examiner.

At the hearing all parties were represented and were afforded full opportunity to present evidence pertinent to the issues, to argue orally and to file briefs. Briefs have been received from General Counsel and the Respondent.

After the hearing the Trial Examiner received from General Counsel a motion to correct the record in certain minor respects. Attached to said motion is certification of its service upon the other parties. No objection has been received. The motion is granted, the record is hereby ordered corrected accordingly, and said motion is made a part of the record.

Upon the record thus made, and from his observation of the witnesses, the Trial Examiner makes the following:

## Findings of Fact

### I. The business of the Respondent

Safway Steel Scaffolds Company of Georgia is a Georgia corporation authorized to do business in Florida. It is engaged in fabrication, sale and leasing of scaffolding for construction purposes and its principal office and place of business is located in Atlanta, Georgia. It maintains and operates offices and places of business and conducts business in Alabama, Georgia and Florida, including a place of business in Miami, Florida, the one operation with which this case is concerned. During the year 1964 the Respondent purchased goods and materials valued at more than $50,000 which were shipped directly to its Atlanta, Georgia, location from States other than Georgia.

The Respondent is engaged in commerce within meaning of the Act.

### II. The Charging Union

The Charging Union, named in the caption above, is a labor organization admitting to membership employees of the Respondent at its Miami plant.

### III. The unfair labor practices

#### A. *Setting and major issues*

In June 1961 the Respondent and the Charging Union entered into a contract which was due to expire May 31, 1964. By letter dated March 26, 1964, the Union notified the Employer that it desired to renegotiate this contract

within the prescribed 60-day period, and asked for meeting dates. On March 31 John E. Wallace, manager of the Miami operations, replied to this request by stating, in substance, that no meeting date could be suggested before late April or early May, but further offered, to "save negotiation time and expense," to "extend the existing contract for one year. [*sic*] The same reply asked the Union to forward any written proposals it might have, if extension was not agreeable.

On April 14 the Union sent the Company certain written proposals for consideration, and urged that a meeting date be granted as early as possible in May, since the contract would expire at the end of that month.

As described in more detail below, meetings were held on various dates between May 4 and August 13, 1964. Despite its offer in March to extend the contract provisions for another year, during the bargaining sessions the Respondent insisted upon a substantial cut in wages, and on July 1 the employees went on strike.

The complaint alleges and the answer denies that: (1) throughout the negotiations the Respondent failed to meet its obligations but in fact bargained in bad faith, and (2) by its unlawful conduct the Respondent caused the strike.

On or about September 21, 1964, the employees then on strike offered unconditionally to return to work. With certain exceptions they were refused reinstatement, a refusal which General Counsel claims was in violation of the Act.

The alleged refusal to bargain and the refusal to re-

instate striking employees, as well as other conduct, especially on the part of Manager Wallace, is claimed by General Counsel to constitute interference, restraint and coercion of employees in the exercise of rights guaranteed by the Act.

B. *The refusal to bargain*

1. Relevant facts

There is no dispute as to the following:

(a) The Charging Union was certified by the Board in 1959 as the exclusive bargaining representative of all employees in a unit consisting of:

> All truck drivers, helpers and warehousemen of the Respondent, but excluding office clerical employees, professional employees, and guards and supervisors as defined in the Act.

(b) A 3-year contract between the parties expired on May 31, 1964. As noted above, in an exchange of communications before the expiration date the Respondent offered to extend the existing contract for 1 year. The Union, however, apparently preferred to attempt, through negotiations, to obtain additional benefits for employees.

(c) On April 14 the Union submitted a list of five items concerning which it proposed negotiations. In summary, the Union asked for: (1) reduction of the probationary period from 90 to 30 days; (2) one additional paid holiday; (3) allowance for sick leave of 1 day each month;

(4) paid vacations of 3 weeks after 6 years of service; and
(5) a wage increase of 20 cents "across the board."

(d) Six negotiating meetings were held on various dates between May 4 and June 30 inclusive. On the latter date, and following a union meeting, the union representative notified the Respondent's representative that the members had voted to strike, and a strike began on July 1.

It is General Counsel's contention that the strike was caused by the Respondent's conduct during the negotiations up to this point, an allegation denied by the Respondent.

Without attempting to set out, in meticulous detail, the testimony of witnesses as to what occurred according to their recollections at each of the bargaining sessions, the Trial Examiner finds that the course of negotiations followed by the parties was, in substance, as follows, including relevant conduct on the part of Manager Wallace. These findings are based upon what the Trial Examiner believes to be the more credible testimony and the probability inherent in circumstances concerning which there is no dispute.

(a) On May 4 the parties met in what was described by the Respondent's spokesman, James W. Hoyt, as "primarily an exploratory meeting." "Without any conclusions being reached," he said, they agreed to meet again later in the month.

(b) On or about May 15 it is undisputed that Manager Wallace, who had attended the May 4 negotiating meeting summoned all employees to a special assembly and, according to his own testimony, read to them the

entire then existing contract, "from front to rear, read it all the way through."[1] Wallace told these colored employees bluntly that he was not getting enough work out of them, and that he could be a "bastard" if he wanted to be. He then declared that no union official would come into the yard again, and that he was getting "rid of the Union."[2]

(c) On May 21 the parties again met for a brief half or three-quarters of an hour. They discussed the Union's demand for 20 cents an hour increase. The company representatives contended that they were already paying more than competitors were, but did not name them. They agreed to meet the next week when the Company would submit a counterproposal.

(d) On May 28 the Respondent submitted a 12-page proposed contract. This document, despite the Respondent's written offer of March 31 to extend for a year the contract then in effect, proposed to cut the wages up to 29 cents an hour, and measurably reduced other current benefits. Confronted with this long proposal of reduced

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[1] Wallace explained that he called this meeting because one employee John Cogdell, had protested a day or so before this that the company was responsible for a traffic ticket he had received. Having observed Wallace throughout the hearing, the Trial Examiner can place no reliance upon any of his testimony which is without the corroboration of more credible witnesses. Scrutiny of the record reveals that reasons advanced by him for his conduct lack logic or reason. According to one part of his testimony, it appears that he disposed of the employee's protest about the ticket by telling him, "Well, it is immaterial to me. Your name is on the ticket. You will be the one they will be looking for." Why he should then have called *all* employees together to read to them the entire contract on entirely unrelated matters is without reasonable explanation by him.

[2] Wallace denied making these statements. The denials are not credited. The manager's subsequent conduct, as described hereinafter, was plainly in furtherance of his threats. The findings rest upon the credible testimony of P. E. and John Cogdell, the former being the union steward among the employees.

wages and benefits, the union representative asked for an opportunity to study it.

(e) At the next meeting, on June 17, the Union abandoned all of its initial demands for an improvement in the existing contract, and cut its wage request of 20 cents an hour in half. The Respondent rejected these greatly reduced demands, and insisted that the wages be cut as it had proposed, and that other alterations as it had proposed become effective. Such alterations included the hiring of itinerant workers and the increase of the workweek from 5 to 6 days. No agreement was reached.

(f) Shortly after this June 17 meeting,[3] which Wallace had attended, the manager called P. E. Cogdell, the union steward, into his office and, in apparent reproach for the brief walkout of a few days earlier, told him he was "no dumb fellow" and should have known that there would be no actual cut in pay. Wallace then told the steward that the only way he could give him more pay was for the men to get out of the Union. He asked him to tell the

[3] While admitting his uncertainty of the exact date Cogdell, upon whose credible testimony the findings to this interview rest, placed it as a Saturday after a 3-day work stoppage which admittedly began on June 15. This would have been June 20. It is clear that Cogdell was mistaken in believing it to have been June 20, but in the opinion of the Trial Examiner an inadvertent error in a date does not disqualify a witness' entire testimony, as counsel for the Respondent in his harsh brief would have it held. Behind this barrier of his brief counsel twice characterized Cogdell as a "liar," chiefly upon the ground of his uncertainty as to dates. Yet his own witness, the Reverend Lanier, whose credible testimony corroborates that of Wallace to the effect that both were fishing on Saturday, June 20, candidly admitted that he had only been able to fix the date by consulting with his sons and calling Wallace's relatives in Atlanta, before taking the stand. As the minister aptly said, "Can anybody just pull a date out of the air?" Cogdell's detailed account of the interview was unshaken by rigorous cross-examination. Counsel for the Respondent had the advantage, during his cross-examination of both P. E. and John Cogdell, of affidavits each had given to a Board agent during the investigation of the case. Yet he cited no instance of inconsistency, on the part of either Cogdell, between his testimony on the witness stand and his previously given affidavit.

men not to worry about being "cut a penny," because Werner, president of the Company, had "plenty" of money, but when he said he would get rid of the Union he would. Wallace also said he was not satisfied with his present foreman, and implied that he might well give Cogdell the job. After discussing the contract and wages for some time, Cogdell finally agreed to talk to the men and report what the manager had said, but said he could not "make up their minds" for them.

(g) On June 29 another negotiating meeting was held, also attended by Wallace. Union Steward Cogdell was also present with the union representative. Except for reducing the insisted-upon cut in wages by 5 cents, the Respondent made no further concessions from its own proposals. The union representative expressed his doubt that the employees would accept even this slightly reduced cut, but said he would submit it to them at a meeting that night, and report the results at a meeting the next day, June 30.

(h) Later that day, Wallace called the union steward aside and asked him how the other men felt about the offer made earlier. Cogdell replied that they did not want a cut. The manager reminded him that he had told him to assure them they would actually lose no money, and suggested that if the men did not want to "go up there," (presumably to the union meeting) that night, he could go and vote for the whole crew. Cogdell finally said he would at least talk to them. Wallace gave him his home telephone number and asked him to call him that night and let him know what "happened." After the meeting Cogdell telephoned to Wallace, and reported that the

men had rejected the offer and would go on strike July 1.[4]

(i) Wallace did not attend the June 30 meeting of the parties. Hoyt was formally notified of the Union's vote the night before, whereupon he announced that the wage cut would become effective anyway, the next day.

(j) On July 1 seven of the eight employees then working went on strike. Matters relevant to the subsequent offer to return to work will be discussed in a later section.

(k) Also on July 1 the Respondent unilaterally changed the wage rates although, as subsequent negotiations establish, bargaining on this issue had not reached an impasse.

(l) A Federal mediator brought the parties together again on August 6. The Union offered to reduce its wage demand again — this time to a 5 cents' increase above the old rates. The Company countered by withdrawing its offer of June 29 to reduce the full cut by 5 cents.

(m) At the final meeting on August 13, the day before the initial charge was filed, the Union capitulated completely, and offered to accept the terms of the expired contract in full — which was precisely what Wallace had proposed in his March 31 letter to the Union, quoted

[4]Again Cogdell was obviously in error when he placed this incident as occurring on June 30, instead of June 29. All circumstances as to which there is no dispute make Cogdell's testimony plausible with the one exception of the date. Wallace was informed at the June 29 meeting that the members would vote that night. He went to Key West on June 30 and did not attend the negotiating meeting of that date. It is wholly unreasonable to believe that he had not been informed of the Union's rejection before he left. His denial that his interview with Cogdell occurred is not credited.

above. The Company rejected even this full capitulation, and no further meetings have been held.

## 2. Conclusions

In his able brief General Counsel urges that the Respondent failed through negotiations to bargain in good faith. The Trial Examiner agrees. The record amply supports the conclusion that from May 15, when Wallace told employees he was going to "get rid" of the Union, to the final meeting, the Respondent conducted its bargaining with the design of reaching this very end. Negotiations so designed as to deprive employees of their right to be represented fall far short of "good faith" bargaining.

The Respondent offered no credible evidence to explain why any cut in wages was required, in view of its offer on March 31 to continue the existing contract for a full year.[5] And, as noted above, the Respondent unilaterally reduced wage rates on July 1 although no final impasse on this issue had been reached.

In short, the Trial Examiner concludes and finds that the Respondent, by its entire course of conduct during negotiations, including Wallace's efforts through Cogdell to undermine the Union's status, refused to bargain in good faith with the Union, and thereby caused the strike of July 1, and interfered with, restrained and co-

[5] Even if certain figures placed in evidence by the Respondent are to be believed, they show that the "net loss" for the first six months of 1964 was proportionately considerably less than for the last 9 months of 1963. The documents indicate a loss of $21,689 for the 1963 period, and only a loss of $10,667 for the 1964 period. It appears clear that either the offer on March 31 to extend the contract for a year was made in bad faith, or that its insistence upon a drastic cut in wages was in bad faith.

erced employees in the exercise of rights guaranteed by Section 7 of the Act.[6]

C. *The refusal to reinstate strikers*

Seven of the ten employees in the unit took part in the strike. One of the seven, Quincy Knox, was in a hospital as the strike began. About July 6 he reported for work but was told by Wallace that his rate would be reduced from his regular $1.74 per hour to $1.45, and when the employee objected, the manager said he could have the money he had been giving the Union as additional take home pay. Knox then joined his fellow-employees on strike.

On July 1 the Respondent sent to each striker, except Knox, a letter which informed him that unless he returned to work by July 6 he would be replaced and "officially discharged." None returned and on that date each was informed by another letter that he had been replaced and was "officially discharged."

On September 18 the Union sent a wire on behalf of the seven employees offering unconditional return to work on September 21. All seven reported on the latter date, but were told by Wallace that he could not use them. As they started out of the plant, however, the manager said he could use two warehousemen at the reduced rate, but no drivers. None returned on that date. Five of the seven were later permitted to return.[7] P. E. Cogdell and

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[6]General Counsel appropriately cites *Herman Sausage Co., Inc.*, 122 NLRB 168, enfd. 275 F. 2d 299 (C.A. 5).

[7] Knox and Johnson on September 22; Anderson on October 20; Rosier on October 26, and James (apparently) at some undisclosed date.

John Cogdell had not, at the time of the hearing, been reinstated.

Since it has been found that the Respondent caused the strike by its unfair labor practices, it was obligated to reinstate the seven strikers on September 21, 1964, the date of their unconditional offer to return. Its refusal to reinstate all who reported that day constituted unlawful discrimination, as well as interference, restraint and coercion of employees in the exercise of rights guaranteed by Section 7 of the Act.

## IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record in the case the Trial Examiner makes the following:

## Conclusions of Law

1. The Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

2. All truckdrivers, helpers and warehousemen of the Respondent, but excluding office clerical employees, profes-

sional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. By virtue of Section 9(a) of the Act, at all times since February 17, 1959, and continuing to date, the Charging Union has been the exclusive representative of all employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

4. By refusing since May 15, 1964, to bargain in good faith with the Charging Union as the exclusive representative of all employees in the said unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

5. By discriminating against employees, as described herein, to discourage membership in and activity on behalf of the Charging Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (3) of the Act.

6. By interfering with, restraining and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## The Remedy

Having found that the Respondent has engaged in unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom, and take certain affirmative action to effectuate the policies of the Act.

It will be recommended that the Respondent offer to P. E. Cogdell and John Cogdell immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them and Quincy Knox, John Johnson, Jimmy Anderson, Eunice Rosier and A. B. James whole for any loss of earnings they may have suffered by reason of the discrimination against them, by payment to each of them, in the cases of the two Cogdells, from September 21, 1964, to the date of offer of full reinstatement, and in the cases of the other five employees named above, from September 21, 1964, to the date of reemployment, of a sum of money equal to that which he would normally have earned as wages, about [*sic*] the discrimination against him, less his net earnings during the respective period of refusal to reemploy, and in a manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and with interest on the backpay due in accordance with Board policy set out in *Isis Plumbing & Heating Co.*, 138 NLRB 716. It will be further recommended that all employees named above, all employees on the July 1, 1964, payroll, and all newly hired employees since that date in the appropriate unit, be made whole for any loss of pay they may have suffered by reason of the unilateral change in wage rates which became effective on July 1, 1964, as described herein.

It will be further recommended that, upon request, the Respondent bargain collectively in good faith with the Charging Union and, if an understanding is reached, embody such understanding in a signed agreement.

Finally, in view of the serious and extended nature of the Respondent's unfair labor practices, it will be recommended that it cease and desist from in any manner infringing upon the rights of employees guaranteed by Section 7 of the Act.

## RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the Respondent, Safway Steel Scaffolds Company of Georgia, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in and activities on behalf of Aircraft and Engine Maintenance and Overhaul, Building and Construction Manufacturing, Processing and Distribution and Allied Industries Employees, Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminatorily discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(b) Discharging employees for exercising the right

guaranteed by Section 7 of the Act to engage in concerted activities for their mutual aid or protection.

(c) Refusing to bargain collectively in good faith with the above-named labor organization as the exclusive representative of its employees in the appropriate unit described herein with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(d) Making unilateral changes in wages, rates of pay, or other terms and conditions of employment of employees in the said unit, in a manner violative of the Act.

(e) Threatening employees with economic reprisals or making promises of benefit to discourage membership in and activity on behalf of the above-named labor organization.

(f) In any manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all employees in the appropriate unit in respect to rates of pay, wages, hours of employment, or

other terms and conditions of employment and embody any understanding reached in a signed agreement.

(b) Revoke the unilateral wage changes instituted on July 1, 1964, and revert to the wage scale and benefits existing immediately prior to said date.

(c) Offer to P. E. Cogdell and John Cogdell immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(d) Make them and employees Knox, Johnson, Anderson, Rosier and James, and all employees in the appropriate unit on the payroll as of July 1, 1964, or newly hired thereafter, for any loss of pay they may have suffered by reason of the discrimination found herein or of the unilateral change in wage rates, as set forth in the section above entitled "The Remedy."

(e) Notify P. E. Cogdell and John Cogdell, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to determine the amounts of backpay due.

(g) Post at its operations in Miami, Florida, copies

of the notice attached hereto marked "Appendix."[8] Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by it immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notice to employees are [*sic*] customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any material.

(h) Notify the said Regional Director in writing, within 20 days from the date of the receipt of this Trial Examiner's Decision, what steps have been taken to comply herewith.[9]

Dated at Washington, D. C., April 5, 1965.

(Signed) C. W. WHITTEMORE
C. W. Whittemore
Trial Examiner

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[8] In the event that these Recommendations be adopted by the Board the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER," shall be substituted for the words "PURSUANT TO A DECISION AND ORDER."

[9] In the event that these Recommendations be adopted by the Board, this provision shall read: "Notify the said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply therewith."

## APPENDIX

## NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to conduct our labor relations in compliance with the National Labor Relations Act, we notify you that:

WE WILL NOT unlawfully discourage you from being members of AIRCRAFT AND ENGINE MAINTENANCE AND OVERHAUL, BUILDING AND CONSTRUCTION MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, or any other union.

WE WILL NOT threaten you with reprisals, or promise any benefits, to discourage you from joining any union.

WE WILL NOT violate any of the rights you have under the NATIONAL LABOR RELATIONS ACT, to join a union of your own choice or not to engage in any union activities.

WE WILL offer reinstatement to P. E. Cogdell and John Cogdell.

WE WILL revoke the wage cut which became effective July 1, 1964.

WE WILL make whole P. E. Cogdell, John Cogdell, and all employees in the appropriate unit who were on the payroll July 1, 1964, or who came on the payroll after that date, for any loss of wages due to the wage cut.

WE WILL, upon request, bargain collectively with the union named above and, if an understanding is reached, sign an agreement covering such understanding. The unit represented by this union includes all our truckdrivers, helpers and warehousemen, but excludes office clerical employees, professional employees, guards and supervisors.

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA
(Employer)

Dated _____

By _____
(Representative Title)

NOTE: We will notify P. E. Cogdell and John Cogdell, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any material.

Employees may communicate directly with the Board's Regional Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida, 33602 (Tel. No. 228-7711), if they have any question concerning this notice or compliance with its provisions.

# APPENDIX B

**Constitutional Provisions:**

U. S. Const. amend. V

"No person shall be . . . deprived of life, liberty or property, without due process of law. . ."

**Statutes:**

Administrative Procedure Act (80 Stat. 381, 5 U.S.C. §§551-559). The relevant provisions are as follows:

Sec. 552 . . .

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) description of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public....

* * * *

Sec. 554... This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .

(c) The agency shall give all interested parties opportunity for — (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit, and; (2) to the extent that the parties are unable so to determine controversy by consent, hearing, and decision on notice and in accordance with sections 556 and 557.

* * * *

Sec. 556 . . .

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(4) take depositions or have depositions taken when the ends of justice would be served; (5) regulate the course of the hearing. . . .

Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. 151 et seq.). The relevant provisions are as follows:

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees. . . .

* * * *

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided* . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

## APPENDIX C

National Labor Relations Board, Rules and Regulations Series 8 as amended 29 C.F.R. Sec. 102.1 *et seq.* The relevant provisions are as follows:

SEC. 102.30. *Examination of witnesses; depositions.* —Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the officer). Such application shall be made to the regional director prior to the hearing, and to the trial examiner during and subsequent to the hearing but before transfer of the case to the Board pursuant to section 102.45 or section 102.50.

* * * *

SEC. 102.35. *Duties and powers of trial examiners.*— It shall be the duty of the trial examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The trial examiner shall have authority, with respect to

cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers . . .

(e) To take or cause depositions to be taken whenever the ends of justice would be served thereby. . . .

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291-005—68

# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1043

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA,
PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 383 F. 2d 273. The Board's decision and order (Pet. App. 25a–48a) are reported at 153 NLRB 417.

### JURISDICTION

The opinion of the court of appeals was issued on September 7, 1967, and a petition for rehearing was denied on October 24, 1967 ( Pet. App. 1a, 17a). The court's decree was entered on November 8, 1967 (Pet. App. 18a–24a). The petition for a writ of certiorari was filed on January 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals properly found that the Company was not prejudiced by the Trial Examiner's denial of its motions to take pretrial depositions.

2. Whether the Board properly concluded that the Company violated the National Labor Relations Act by, *inter alia,* unilaterally reducing employees' wages before a *bona fide* impasse in contract negotiations had been reached.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition, pp. 51a–52a.

## STATEMENT

### A. THE BOARD'S DECISION

1. On March 26, 1964,[1] the Union[2] notified petitioner Company that it wished to renegotiate the parties' collective bargaining agreement, scheduled to expire on May 31 (Pet. App. 29a–30a; R. 82a; J.A. 103–104).[3] John E. Wallace, petitioner's manager, replied that no date for negotiations could be set before late April or early May, but that, if the Union wished to "save

[1] All dates are in 1964.

[2] Aircraft and Engine Maintenance and Overhaul, Building and Construction Manufacturing, Processing and Distribution and Allied Industries Employees, Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[3] "R." refers to Volume I, Transcript of Record, and "J.A." refers to the Joint Appendix, filed in the court below.

negotiation time and expense," the Company would consider "extend[ing] the existing contract for one year" (Pet. App. 30a, R. 8a; J.A. 104–105). Wallace added that, if the Union found such an extension not agreeable, it should forward to the Company any other proposals it might have (Pet. App. 30a; R. 82a; J.A. 104–105). On April 14, the Union submitted a written proposal to the Company which requested: 1) a reduction of the probationary period from 90 days to 30 days; 2) one additional paid holiday; 3) a sick leave allowance of one day each month; 4) paid vacations of three weeks after six years of service; and 5) a wage increase of 20 cents "across the board" (Pet. App. 31a–32a; R. 84; J.A. 106–107).

At a preliminary meeting on May 4 the parties merely agreed to meet again on May 20 (Pet. App. 32a; R. 84–85; J.A. 75–76). On May 15, Manager Wallace, who had attended the May 4 meeting, assembled all of his employees and read them the existing Union contract (Pet. App. 32a–33a; R. 85; J.A. 445–446). He told the employees that he was not getting enough work out of them and that he could be a "bastard" if he wanted to be (Pet. App. 33a; R. 85; J.A. 45–46, 57–58). Finally, Wallace stated that he was "getting rid of the Union" and that no Union officials could come into the plant again (Pet. App. 33a; R. 85; J.A. 45–46, 57–58).

At the next bargaining session, on May 21, the parties discussed the Union's proposal of a uniform wage increase of 20 cents an hour (Pet. App. 33a; R. 85; J.A. 15, 22). The Company contended that it

could not agree to this demand since it was already paying more than its competitors (whom it did not identify) (Pet. App. 33a; R. 85–86; J.A. 22, 35–36.) The parties agreed to meet again the following week, when the Company would submit a counterproposal (Pet. App. 33a; R. 86; J.A. 15–16, 21–22, 107).

On May 28, the Company submitted a proposed contract to the Union (Pet. App. 33a; R. 86; J.A. 16). In place of its earlier offer to continue the existing contract for one year, the Company proposed to cut the existing wages of warehousemen by 29 cents (from $1.74 to $1.45 per hour) and those of truckdrivers by 15 cents (from $1.90 to $1.75 per hour), and to reduce or eliminate other employee benefits and working conditions then in effect (Pet. App. 33a; R. 86; J.A. 16, 107–139). The Union asked that it be given an opportunity to study these proposals (Pet. App. 33a–34a; R. 86; J.A. 16).

On June 15, the Company wrote the Union that unless it responded to the Company's proposals the Company would terminate the old contract and change the wage rates on July 1 (J.A. 143–144). When the parties met on June 17 the Union abandoned all of its prior proposals for changes in the expired contract and instead proposed a wage increase of 10 cents per hour (Pet. App. 34a; R. 86; J.A. 17–18). The Company refused to accept this offer and insisted that its roll-back counterproposal of May 28 be accepted without change (Pet. App. 34a; R. 86; J.A. 17). The meeting was adjourned without agreement (Pet. App. 34a; R. 86; J.A. 17–18).

Shortly after the June 17 meeting, Manager Wallace called Union Steward Frank E. Cogdel into his office and told him that the only way that the Company could give the employees more money was for them to "get out of the Union" (Pet. App. 34a; R. 86–87; J.A. 47). Wallace added that the employees were not to worry about being "cut a penny in pay" because the Company president had "a lot of money." Wallace also stated that, when the president said he would get rid of the Union, he would. (Pet. App. 34a–35a; R. 87; J.A. 47.) Cogdel told Wallace that he would talk to the men, but that he could not make up their minds for them (Pet. App. 35a; R. 87; J.A. 47–49).

At the negotiating session on June 29, the Company offered to reduce its proposed cut in wages by five cents, thereby proposing a wage rate of $1.50 for warehousemen and $1.80 for drivers (Pet. App. 35a; R. 87–88; J.A. 25–30). However, the Company made no change in its proposal to reduce other employee benefits (Pet. App. 35a; R. 88; J.A. 25–29). The Union representatives stated that they were very dubious that the men would accept such a proposal, but that it would be presented at the Union meeting to be held that night (Pet. App. 35a; R. 88; J.A. 25–30).

Later in the day, Manager Wallace asked Union Steward Cogdel what the men thought about the Company's latest wage offer (Pet. App. 35a; R. 88; J.A. 49). When Cogdel replied that the men did not want a cut in wages, Wallace reminded him of his previous

assurance that the Company was "not going to cut them a penny" (Pet. App. 35a; R. 88; J.A. 49), but Wallace also explained that they did not "need the Union in here," and that, if it were ousted, management and the employees could "get together and work like one happy family" (Pet. App. 35a; R. 88; J.A. 49). Wallace then gave Cogdel his telephone number and asked that after the Union meeting Cogdel call and tell him what had happened (Pet. App. 35a; R. 88; J.A. 50). That night, Cogdel called Wallace and informed him that the men had rejected the Company's offer and had voted to strike on July 1 (Pet. App. 35a–36a; R. 88; J.A. 50–51).

The Company and the Union representatives met again briefly on June 30, at which time the Company was formally notified of the strike scheduled for the following day (Pet. App. 36a; R. 88; J.A. 30–31, 38). The Company's representative stated that, irrespective of what the Union might do, the previously announced reduction in pay would go into effect on July 1 (Pet. App. 36a; R. 88; J.A. 39).

On July 1, six of the Company's eight employees went on strike[4] (Pet. App. 36a; R. 89; J.A. 41). The

[4] Employee Quincy Knox, who had been in the hospital at the time of the strike, returned to the plant on July 6, and was told by Manager Wallace that his pay had been reduced from $1.74 to $1.45 per hour (Pet. App. 38a; R. 90–91; J.A. 63–64). When Knox objected to this cut in pay, Wallace told him that the Union was no longer in the plant, and that Knox could consider the dues that he formerly paid the Union to be additional take-home pay (Pet. App. 38a; R. 91; J.A. 63–65). Knox thereupon joined the other strikers (Pet. App. 38a; R. 91; J.A. 65–66).

Company immediately sent letters to each of the six employees, stating that unless the employee returned to work by July 6 he would be discharged as of that date (Pet. App. 38a; R. 91; J.A. 43, 139–140). None of the employees returned to work, and, on July 6, each received a notice that he had been replaced and was "officially discharged" (Pet. App. 38a; R. 91; J.A. 141).

On August 6 and again on August 13, a federal mediator called the parties together in an effort to settle the dispute (Pet. App. 36a; R. 89; J.A. 31–32). At the first of these meetings, the Union offered to reduce its wage demands to a five cent increase over the pre-July 1st rates (Pet. App. 36a; R. 89; J.A. 32). The Company countered by withdrawing its offer of June 29 to reduce by five cents the proposed cut in wages. The Company thus returned to rates of $1.45 for warehousemen and $1.75 for drivers, a scale which it had first proposed on May 28 and which it had in fact unilaterally established on July 1 (Pet. App. 36a; R. 89; J.A. 32). On August 13, the mediator, after meeting with the Union separately, told the Company that he felt positive that the Union would accept a contract with the same terms as the expired contract (Pet. App. 36a; R. 89; J.A. 32–33). The Company refused this offer (Pet. App. 37a; R. 89; J.A. 33). No further meetings were held (Pet. App. 37a; R. 89; J.A. 33).

2. After the union filed its charges (R. 13–16, 18–28), the General Counsel issued a complaint against the Company (R. 30–38), and these unfair labor practice proceedings ensued. Shortly before the hearing

was to be held, the Company filed motions to take oral depositions and written interrogatories of the employees referred to in the complaint. The depositions were sought on the general ground that they were "necessary for [the Company] properly to prepare its defense" (R. 53–54), and the application to submit written interrogatories was based on the assertion that such a course would be "in accordance with Rule 31, Federal Rules of Civil Procedure" (R. 60–61). The trial examiner denied both of these motions on the ground that the National Labor Relations Act does not authorize pretrial discovery (R. 59–60, 64).

3. On the basis of the evidence set forth above, pp. 2–7, the Board found[5] that the Company, by its entire course of conduct during the negotiations, failed to bargain in good faith with the Union, in violation of Section 8(a) (5) and (1) of the Act (Pet. App. 25a–26a, 37a–38a, 40a). The Board rejected the Company's contention that its unilateral institution of a wage cut was permissible, because the evidence showed that no genuine impasse in the bargaining negotiations had occurred (Pet. App. 36a, 26a, n. 3).[6] The Board's

[5] On exceptions by the Company (R. 101–109), the Board adopted the findings, conclusions, and recommendations of the trial examiner (R. 116–117).

[6] The Board also found that the Company, by its unlawful refusal to bargain in good faith, caused the strike of July 1; that the strikers were therefore engaged in an unfair labor practice strike, and thus were entitled to reinstatement upon unconditional application; and that the Company's refusal to grant reinstatement upon such application constituted discrimination against the strikers, in violation of Section 8(a) (3) and (1) of the Act (Pet. App. 25a–26a, 38a–39a, 40a). The Company does not here contest these additional findings.

order, *inter alia,* required the Company to bargain with the Union upon request and to embody any understanding reached in a signed agreement. The order further required the Company to revoke the unilateral wage scale adopted on July 1, 1964, and to restore the wage scale and benefits existing immediately prior to that date (Pet. App. 26a–27a, 43a–45a).

The Board also affirmed the trial examiner's rulings denying discovery (R. 101, 116–117).

### B. THE DECISION OF THE COURT OF APPEALS

The court of appeals held that the Board's unfair labor practice findings were supported by substantial evidence (Pet. App. 10a–14a). The court further concluded that, although the examiner had erred in holding that the Act does not authorize pre-hearing discovery, his denial of the Company's request to take the depositions of its employees did not prejudice it (Pet. App. 4a–9a). Accordingly, the court enforced the Board's order (Pet. App. 14a–16a).[7]

## ARGUMENT

1. The principal issue petitioner raises (Pet. 11–14)—whether the National Labor Relations Act authorizes the use of pre-hearing discovery—is not presented by this case, for the court of appeals agreed

[7] The court refused to enforce that part of the Board's order which required the Company to refrain from violating Section 7 of the Act "in any manner" (Pet. App. 14a–16a). In the court's view, there was "no showing of a proclivity to violate the Act" and therefore, the court ruled, this broad provision in the order was inappropriate in the circumstances of this case (Pet. App. 16a).

with petitioner that the Act authorizes "a trial examiner to permit the taking of depositions in any case where such a procedure would be practical" (Pet. 4a).[8] It held, however, that the examiner's refusal to permit the Company to take depositions was a mere "technical error which did not result in prejudice to [the Company's] case" (*id.* 6a). The correctness of this latter ruling presents no issue warranting further review, since whether a particular denial of pre-trial discovery was prejudicial necessarily turns upon the

[8] In rejecting a claim that the Board's refusal to permit the taking of pre-hearing depositions denied an employer procedural due process, the Ninth Circuit has stated: "There is no provision in the Act authorizing the use of the discovery procedure." *National Labor Relations Board* v. *Globe Wireless, Inc.*, 193 F. 2d 748, 751. Two courts of appeals have ruled that it lies within the Board's discretion to decide whether to permit the taking of depositions. *Trojan Freight Lines, Inc.* v. *National Labor Relations Board*, 356 F. 2d 947, 948 (C.A. 6); *National Labor Relations Board* v. *Gala-Mo Arts, Inc.*, 232 F. 2d 102, 106 (C.A. 8). The Board's practice is to permit the taking of depositions only where necessary to perpetuate testimony; and to deny access to employees' statements made to Board agents in pre-trial investigations unless and until the employees testify at the hearing. The latter practice was upheld in *National Labor Relations Board* v. *Vapor Blast Manufacturing Co.*, 287 F. 2d 402, 407–408 (C.A. 7), certiorari denied, 368 U.S. 823.

In *National Labor Relations Board* v. *Southern Materials Co.*, 345 F. 2d 240, 244 (C.A. 4), which petitioner erroneously asserts to be in conflict with the decision below (Pet. 12–13), the court stated in dictum that the Board "should freely permit discovery * * *." The actual holding was that the Board's order was invalid on the merits, and the court stated that it therefore found it unnecessary to decide whether the company was entitled to have the Board's General Counsel answer pre-hearing interrogatories.

facts of the individual case and does not involve any issue of general importance.

Moreover, the court of appeals correctly ruled that no prejudice resulted here. The court noted (*ibid.*) that the finding of an unfair labor practice rested largely on statements by Wallace "which tended to undermine the union" and on a "unilateral reduction in wages before a bargaining impasse had been reached." The court properly concluded (*id.* 6a–7a) that the latter event was determined by looking to the undisputed chronology of events, upon which pretrial discovery could "not have shed a different light"; and that, if the Company had any basis for discrediting the statements attributed to Wallace, it could have called the employees who were said to have heard them, or cross-examined the witnesses called by the General Counsel, or introduced rebuttal testimony.

2. There is no merit to the Company's contention (Pet. 15–16) that the court of appeals misapplied this Court's holding in *National Labor Relations Board* v. *Katz,* 369 U.S. 736, when it upheld the Board's finding on the merits that the Company violated Section 8(a)(5) of the Act by unilaterally reducing its employees' wages. It is undisputed (Pet. 15) that *Katz* permits an employer to make a unilateral change in the terms of employment under negotiation only after a *bona fide* impasse in the bargaining has been reached. In the instant case, the Board found on the basis of substantial evidence that, when the Company put its wage reduction into effect on July 1, the parties had not in fact reached an impasse on wages, as the subsequent

negotiations on that issue with the mediator confirmed (Pet. App. 36a; *supra*, p. 7). Moreover, even if there was an impasse on July 1, it was not a *bona fide* one, since it had been induced by the Company's prior bad faith bargaining (Pet. App. 26a, n. 3). The court below sustained these Board findings (Pet. App. 12a–13a). An employer's unilateral change of wages in these circumstances is an unfair labor practice. *National Labor Relations Board* v. *Herman Sausage Co.*, 275 F. 2d 229, 231–232 (C.A. 5); *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 136 (C.A. 9), certiorari denied, 338 U.S. 827.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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